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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

NORFOLK SOUTHERN RAILWAY COMPANY
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association of approximately 50,000 trial attorneys practicing throughout the country. ATLA members primarily represent injured victims and their families, including those involved in railroad grade crossing accidents. Historically, the states have provided legal remedies for wrongful injury through common law and statutory tort actions. ATLA is concerned that defendants have urged an overly-broad and unwarranted application of the doctrine of federal preemption to eliminate these state tort remedies.

The importance of the issue in this case extends far beyond the parties. Appellant advocates an application of federal preemption that exceeds the limited scope recognized by this Court, and ignores the well-settled presumption against preemption. The result would be to transform a federal statute that was designed to increase safety at railroad crossings into a shield against liability for harm caused by negligent failure to install warning devices. In ATLA's view, such a result is contrary to the values of federalism and the fundamental right of injured victims to obtain legal redress.

SUMMARY OF THE ARGUMENT

The primary issue in this case is whether the Federal Railroad Safety Act, 49 U.S.C. § 20106, preempts Respondent's state law inadequate signalization claim. In enacting this statute, Congress addressed a serious and widespread problem of injuries and deaths in grade crossing collisions. Congress made federal funds available to assist railroads in fulfilling their common law duty to provide adequate signalization. Congress plainly intended railroads to improve the safety of grade crossings. It would indeed be a bitter irony if a regulation enacted to enhance safety and improve the level of protection at railroad grade crossings

became the source of the total abrogation of the railroads' responsibility for safety at those crossings.

In this Amicus brief, ATLA addresses five related issues. First, Amicus stresses the heavy presumption against the preemption which Petitioner seeks. The presumption against preemption is based upon Congressional intent and prior decisions of this Court.

Second, Amicus asks the Court to adopt the two-part test for preemption set forth in the Sixth Circuit's *Shanklin* opinion, and further urges the Court to add a third part to this test. The Sixth Circuit's two-part test provides that state common law inadequate signalization claims may be preempted where (1) federal funds have been expended at the crossing in question, and; (2) the Secretary of Transportation has approved the existing warning devices. Amicus urges the Court to adopt a third and equally important part for this test: that the devices approved by the Secretary be installed and operating. The Sixth Circuit did not consider this third element, installation and operation of the approved devices, because Petitioner failed to prove the second condition, i.e., that the Secretary had approved signalization at the crossing in question. Allowing preemption to be based solely upon the Secretary's approval of warning devices would subject the public to unnecessary, unacceptable and unintended risks.

Third, Amicus points out that a state's expenditure of federal funds to implement a state "minimum protection program" cannot be the basis for federal preemption. In the present case, Tennessee's minimum protection program merely complied with the Manual on Uniform Traffic Control Devices for Streets and Highways warning requirements. This Court's *Easterwood* decision holds that preemption cannot be based upon compliance with the MUTCD. Further, because the minimum protection programs of the different states vary greatly, a rule basing preemption on them is not workable.

Fourth, Amicus raises the issue whether preemption of claims at a given crossing is permanent. The fact that claims are preempted in one case does not necessarily mean that claims are forever preempted at that crossing, as circumstances bearing directly on the Secretary's signalization approval may change. The option of revisiting the Secretary's approval, and thus the entire preemption issue, must be left open.

Fifth and finally, the Court should reject the argument that under 23 U.S.C. § 409 Petitioner cannot comply with the Sixth Circuit's opinion. The Sixth Circuit opinion requires railroads, in order to prove preemption, to demonstrate the Secretary's approval of the signalization at the crossing. Petitioner argues that it cannot make this showing because the documents necessary to prove the Secretary's approval are privileged under 23 U.S.C. § 409. Petitioner's argument fails because it reads 23 U.S.C. § 409 far too broadly. This Court should adopt the Sixth Circuit's narrow interpretation, which is that § 409 does not protect FHWA approval documents. The Court should also find that § 409 does not protect documents showing installation and operation of the approved devices. Finally, the Court should adopt the Sixth Circuit's implicit ruling that § 409 covers only those documents explicitly listed in 23 U.S.C. §§130, 144 and 152.

ARGUMENT

INTRODUCTION

On March 25, 1999, National Transportation Safety Board Chairman Jim Hall testified before Congress that "collisions between trains and vehicles or pedestrians at highway grade crossings are far too common."[2] According to

[2] Testimony Regarding Grade Crossing Safety, Before the Subcommittee on Surface Transportation and Merchant Marine of the Senate Committee on Commerce, Science and Transportation, March 25, 1999. (statement of Jim Hall, NTSB Chairman). Available online at www.ntsb.gov/speeches/jhc990325.htm and WESTLAW at 1999 WL 8086013.

the Federal Railroad Administration, in 1996 there were 4,054 accidents involving highway vehicles at grade crossings.[3] In 1998, there was a collision between a train and a car or truck every 160 minutes[4].

There are more than 259,000 highway/rail grade crossings in the United States.[5] Two-thirds of these crossings are "passive," that is, lacking automatic warning devices (such as gates and flashing lights). The grade crossing at which Respondent Dedra Shanklin's husband was killed was a "passive" crossing.

Passive crossings account for more than 60 percent of crossing deaths each year[6]. In 1996, 247 people were killed in collisions at passive crossings.[7]

The accidents and deaths occurring at our nation's passive grade crossings can be sharply limited by better signalization. Installation of automatic gates and lights at passive crossings reduces the possibility of accidents by

[3] National Transportation Safety Board, "Safety Study, Safety at Passive Grade Crossings," Vol. 1: Analysis at Ch. 1, p.5 (PB98-917004 NTSB/SS-98/02, 1998), citing United States General Accounting Office, "Railroad safety: status of efforts to improve railroad crossing safety," at 33 (GAO/RCED-95-191, 1995).

[4] Jim Hall, Congressional testimony, March 25, 1999, *supra* note 2.

[5] *Id.*

[6] Testimony Regarding Automatic Train Control Before the Subcommittee on Railroads of the House Committee on Transportation and Infrastructure, and the Subcommittee on Technology of the Committee on Science, March 27, 1996 (statement of Jim Hall, NTSB Chairman). Available online at www.ntsb.gov/speeches/jh960327.htm.

[7] NTSB, "Safety Study, Safety at Passive Grade Crossings," *supra* note 3, at 33.

90%.[8] Adequate signalization saves lives while inadequate signalization takes them.

State common law uniformly places a duty on railroad companies to provide adequate signalization at grade crossings. Congress has made federal funds available to fund signalization improvement, which helps railroads to fulfill their common law duty. Petitioner now asks the Court to adopt a rule which would preempt state court inadequate signalization claims based on this expenditure of federal funds, from which railroads already reap substantial benefit. The effect of such a rule would essentially be to immunize railroads from liability at grade crossings. It is remarkable indeed that the railroad would attempt to use the expenditure of federal funds, which by itself affords railroads substantial benefit, as a basis for preemption.

I. THERE IS A STRONG PRESUMPTION AGAINST PREEMPTION.

This Court has consistently applied a heavy presumption against preemption, and has instructed that when Congress legislates in a field that states have traditionally occupied, the Court

> start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), quoted in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Because "the regulation of health and safety matters is primarily and historically, a matter of local concern," *Hillsborough County v. Automated Medical Laboratories,*

[8] California Public Utilities Commission, "The Effectiveness of Automatic Protection in Reducing Accident Frequency and Severity at Public Grade Crossings in California," June 30, 1974 (reprint ed., Federal Highway Administration, U.S. Dept. of Transportation, August 1975).

Inc., 471 U.S. 707, 719 (1985), the presumption against preemption "is particularly apt" in the area of railroad safety. *Rogers v. Consolidated Rail Corp.*, 948 F.2d 858, 859 (2d Cir. 1991).

There is a "basic assumption that Congress did not intend to displace state tort law," *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981); *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981). This rule is an essential principle of judicial restraint that preserves our system of federalism by "avoiding unintended encroachments on the authority of the States." *CSX Transp. Inc. v. Easterwood,* 507 U.S. 658, 664 (1993); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Title 49, United States Code, § 20106, the preemption statute at issue in this case, contains an express preemption clause.[9] This Court has held that the heavy presumption against preemption mandates a narrow construction of express preemption provisions. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

The heavy presumption against preemption is also particularly applicable to 49 U.S.C. §20106, in that the plain language of the preemption provision chosen by Congress "displays considerable solicitude for state law". *Easterwood,* 507 U.S. at 665.

The heavy presumption against preemption preserves the right of redress for those who have been wronged, a cornerstone of our judicial system. Early in our history, Chief Justice Marshall described the importance of this right:

> the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an

[9] "A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. §20106.

> injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

This common-law right of access to justice preceded even the Constitution.[10] It is so fundamental that this Court has recognized that "[i]t is the duty of every State to provide, in the administration of justice, for the redress of private wrongs". *Missouri Pacific Ry. Co. v. Humes,* 115 U.S. 512, 521 (1885).

The right to a remedy is also explicitly guaranteed in thirty-seven state constitutions. Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 615 n.218 (1981); Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202 (1964). The continued vitality of these state constitutional protections of tort remedies is reflected in the decisions of state supreme courts striking down state legislation which sought to limit recoverable damages. *See, e.g., Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991); *Smith v. Department of Insurance,* 507 So. 2d 1080 (Fla. 1987); *Kansas Malpractice Victims Coalition v. Bell,* 757 P.2d 251 (Kan. 1988); *Lucas v. United States,* 757 S.W.2d 686 (Tex. 1988); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

Because the right of the people to obtain redress for wrong is so essential to our form of government, and because state law provides the primary mechanism for protecting this

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[10] Lord Coke traced this right to the Magna Carta, restating it in the form that is reflected in many state constitutions:

> Every Subject may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without denial, and speedily without delay.

Edward Coke, SECOND INSTITUTE 55-56 (4th ed. 1671).

right, any attempt to preempt state law claims must be closely scrutinized. In *Medtronic*, this Court narrowly interpreted an express preemption provision, observing that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 518 U.S. at 487, quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

The presumption against preemption requires far more than the paltry showing made by the Petitioner in this case. Amicus urges the Court to embrace the arguments set forth in the Respondent's brief, and to reject the claim of preemption.

II. THE COURT SHOULD ADOPT THE SIXTH CIRCUIT'S TWO-PART PREEMPTION TEST, AND ADD A THIRD REQUIREMENT THAT WARNING DEVICES APPROVED BY THE SECRETARY MUST BE "INSTALLED AND OPERATING"

In *Shanklin v. Norfolk Southern Railway Company*, 173 F.3d 386 (6th Cir. 1999), the Sixth Circuit adopted the Seventh Circuit's two-part test for preemption in grade crossing cases:

> Thus, the Seventh Circuit in *Shots* [*v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994)] announced a two-part test for preemption in grade crossing cases: (1) establish whether subsection (b)(3) or (4) applies at all (i.e., whether federal funding participated in the installation of warning devices at the crossing in question); and (2) establish whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4). In other words, a court must first establish that (b)(3) and (b)(4) are applicable, and then establish that either (b)(3) or (b)(4) was, in fact, applied.

Amicus asks the Court to adopt this test, but to add a third requirement, that the devices approved by the Secretary be installed and operating before preemption can occur. Several courts have recognized that the actual installation and operation of devices approved by the Secretary is a prerequisite to preemption. In *St. Louis Southwestern R.R. Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994), *cert. denied*, 514 U.S. 1110 (1995), the Eighth Circuit explained why installation and operation is required:

> Before preemption, the public is protected by a railroad's state common-law duty of care. After installation of federally mandated warning devices, the public is protected by those devices. A plan to install devices and federal approval of a plan do not protect the public, however. The Railway's interpretation that federal approval triggers preemption would leave the public unprotected between the time of approval and the time the prescribed devices are installed and operating. This can be a substantial period of time. In this case, it was fifteen months. To encourage prompt installation of federally prescribed warning devices, a railroad's common-law duty of care must continue until those devices are installed.

39 F.3d at 867. The *Malone Freight Lines* court based this holding on its interpretation of *Easterwood*:

> Rather than looking to federal approval or fund allocation as triggering preemption, the Supreme Court [in *Easterwood*] focused on the equipment installed at the crossing. Because the only equipment installed was circuitry, which was not a passive or active warning device as defined in 23 CFR § 646.204(i)-(j), the Court held the claim was not pre-empted.

Id. See CSX Transp. Inc. v. Easterwood, 507 U.S. at 672 ("the only equipment installed was the motion-detection

circuitry"); *Bryan v. Norfolk and Western Ry. Co.*, 154 F.3d 899, 904 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 921 (1999) ("once . . . [approved] safety devices . . . are installed and operating, state law negligence claims are preempted by federal regulations . . ."); *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 190 (1997) ("once warning devices paid for with federal funds are installed and operating, the railroad's common-law duty of care ceases, and it is entitled to the benefit of federal preemption").

In both the Sixth Circuit's *Shanklin* opinion and in *Shots*, the Secretary's approval of warning devices was absent, meaning that the second portion of the two-part test was not met. Because the second part was not satisfied in either case, there was no need for either court to address the "installed and operating" issue. As the Eighth Circuit recognized in *Malone Freight Lines*, however, where the Secretary has approved signalization, the approved devices must be installed and operating before preemption can occur.

Amicus requests that when adopting the Sixth Circuit's two-part preemption test (adopted from the Seventh Circuit's *Shots* opinion), the Court add a third requirement, that the warning devices approved by the Secretary be installed and operating before preemption can occur.

III. THE EXPENDITURE OF FEDERAL FUNDS TO IMPLEMENT A STATE'S "MINIMUM PROTECTION PROGRAM" CANNOT BE A BASIS FOR FEDERAL PREEMPTION.

Prior to the accident which killed Eddie Shanklin, the state of Tennessee implemented a "minimum protection program", in order to bring its crossings into conformance with the last sentence of 23 U.S.C. § 130(d).[11] *Shanklin v.*

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[11] 23 U.S.C. § 130(d) provides:

> (d) Survey and Schedule of Projects. - Each State shall conduct and systematically maintain a survey of all

Norfolk Southern Railway Company, 173 F.3d at 388. States must comply with 23 U.S.C. § 130 in order to obtain federal funding for railroad crossing improvements. Congress added subsection (d) in 1987 (Pub. L. 100-17). 23 U.S.C. § 130 ("Amendments").

Subsection (d) requires, at a minimum, that every crossing be equipped with "signs." In 1987, the Tennessee Department of Transportation ("TDOT") installed reflectorized "crossbucks" at the Oakwood Church Road crossing, apparently to satisfy § 130(d)'s mandate for "signs."[12]

According to the Sixth Circuit's opinion, the only warning provided at the Oakwood Church Road Crossing under Tennessee's "minimum protection plan" was crossbucks. 173 F.3d at 388. In its brief, Petitioner alleges that Tennessee's "minimum protection program" also required two advanced warning signs and two advanced pavement markings at each crossing, in addition to reflectorized crossbucks. Petitioner's Brief at 20-21.

Amicus assumes, for the sake of argument, that Petitioner's interpretation of Tennessee's "minimum protection program" is accurate, and that this program required two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing. As such, the warning devices at the Oakwood Church Road Crossing would have complied with the Manual on Uniform

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> highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. *At a minimum, such a schedule shall provide signs for all railway-highway crossings.* [emphasis added]

[12] A "crossbuck" is the "x" shaped white sign bearing the words "Railroad Crossing", commonly seen posted on roads approaching railroad crossings.

Traffic Control Devices for Streets and Highways ("MUTCD").

In *CSX Transp. Inc. v. Easterwood*, 507 U.S. at 670, this Court held that compliance with the MUTCD standards cannot serve as a basis for preemption. Petitioner argues, however, that Tennessee's "minimum protection program" exceeded the requirements of the MUTCD. This statement is wrong.

Assuming that Petitioner's characterization of the protective devices present at the Oakwood Church Road Crossing is accurate, the crossing complied with the MUTCD, which requires the three types of passive warnings: (1) crossbucks (MUTCD § 8B-2); (2) railroad advance warning signs (MUTCD § 8B-3)[13], and; (3) pavement markings (MUTCD § 8B-4).[14] *Easterwood* plainly holds that compliance with the MUTCD cannot justify preemption, and the Tennessee minimum protection program did nothing more than comply with the MUTCD.

Amicus is concerned that the Court might consider a rule that would allow preemption to occur based on a state's expenditure of federal monies to implement a "minimum protection plan." Such a rule would be wholly unworkable for several reasons.

First, there are disparities among the "minimum protection plans" of the various states. Tennessee's program, for example, required two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing. Indiana developed a minimum protection program in 1975, pursuant to which many of its

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[13] A railroad advance warning sign is a circular yellow sign, 36 inches in diameter, depicting a black cross and the letters "RR". MUTCD § 8B-3.

[14] "Pavement markings in advance of a grade crossing shall consist of an X, the letters RR, a no passing marking (2-lane roads), and certain traverse lines". MUTCD § 8B-4.

crossings were equipped with reflectorized crossbucks, but nothing more. *Shots v. CSX Transp., Inc.*, 38 F.3d 304, 306 (7th Cir. 1994). In the 1990's, Texas implemented a similar program, which required that crossbucks at all passive grade crossings be fitted with retroreflective paint.

Addressing Indiana's minimum protection program, Judge Posner noted in *Shots* that "minimum is not a synonym for optimum, or even adequate." 38 F.3d at 308. Judge Posner further observed that, as a result of minimum protection programs, "adequate safety might be sacrificed at some crossings to enable minimum safety to be achieved at all." *Id.* He described minimum protection programs as merely "a step on the road to adequate safety rather than a determination by [states] or the federal Secretary of Transportation as to what safety devices would be adequate . . ."). *Id.* at 309.

Evidence taken in a Texas grade crossing case[15] also demonstrates that, by their very definition, minimum protection plans are just that -- *minimum*. They are not *adequate* protection programs.

The minimum protection program which Texas implemented in the 1990's provided minimum protection at Texas' grade crossings: reflectorized tape on all crossbucks. The program was not intended to take the place of or even include engineering studies required by 23 C.F.R. §646.214(b)(3) and (b)(4). It was not intended to make grade crossings in Texas adequately safe. This was made clear in the testimony of Richard Gumtau, the Regional Highway Safety Engineer for the Federal Highway Administration (region of Texas, New Mexico, Oklahoma, Arkansas and Louisiana) from 1978 to 1997, in the Texas case:

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15 *Chorn v. Atchison, Topeka & Santa Fe Ry. Co.*, Cause No. 95-811, Texas, 171st Judicial District Ct., El Paso County.

Q. Sir, with respect to crossings that receive the reflectorized tape on the back of cross bucks, did the Federal Highway Administration conduct any independent investigation of any of the crossings to determine whether or not the addition of the tape to existing crossings would make the crossing safe?

A. None that I am aware of.

Q. And in your position as the person for the region responsible for oversight, would it be your belief that if such a program had taken place, you would have been familiar with it?

A. Yes, sir.[16]

Q. Sure. You've indicated that the purpose of the use of the reflectorized tape was to enhance the visibility of the cross bucks at night; correct?

A. Correct.

Q. And you've indicated that in order to determine whether or not crossings needed automatic signals, the normal procedure was for a state diagnostic team to do an evaluation and then make recommendations based on evaluation.

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16 Deposition Testimony of Richard O. Gumtau at p. 15, ll. 4-15, *Chorn v. Atchison, Topeka & Santa Fe Ry. Co.*, Cause No. 95-811, Texas, 171st Judicial District, El Paso County (taken March 25, 1998).

A. Correct.

Q. My question is: In authorizing the use of money to put reflectorized tape on cross bucks on passive crossings that didn't have automatic gates, the Federal agency wasn't in any way making a determination as to whether or not these crossings needed or didn't need gates and lights; correct?

A. That's correct.[17]

Q. (By Mr. Haralson) Sir, would it be correct that it was not the expectation of your agency that the tape would be used in lieu of or in place of automatic gates and lights if automatic gates and lights were needed at a crossing; correct?

A. That is correct.[18]

Q. Sir, to make that question a little broader: To your knowledge, did your agency or any Federal agencies in any of the states in any of your regions, or in the region that you were responsible for, attempt to make any individual determination as to whether or not the use of reflecting tape made the crossings safe and eliminated the need for automatic signals of any kind?

[17] *Id.* at p. 20, ll. 8-24.

[18] *Id.* at p. 21, ll. 2-7.

A. Not that I'm aware of.

Q. To your knowledge, did your agency or any Federal agency require the State of Texas to do any independent evaluation of each of the crossings before applying the retroreflectorized material to the cross bucks?

A. Not that I'm aware of.[19]

Darin Kosmak, the Texas Department of Transportation employee who served as liaison between his department, the FRA and the railroads, also testified in *Chorn*. Kosmak, who was responsible for overseeing the expenditure of federal funds allocated from the FRA to the State of Texas for rail-highway grade crossing improvements, also testified that Texas' program was not designed to replace or include engineering studies required by 23 C.F.R. §646.214(b)(3) and (b)(4), and that the program was not intended to make any crossings in Texas adequately safe:

Q. Okay. You've indicated, sir, that the State of Texas has never sent a diagnostic team to the crossing to do a diagnostic-type evaluation and, to the best of your knowledge, the State has never sent anyone qualified in traffic engineering to the Lower Street crossing to do any type of traffic engineering evaluation of the crossing to see whether or not the gates -- or the passive devices were adequate based on the traffic engineering study; is that correct?

[19] *Id.* at p. 26, ll. 9-23.

A. Yes, that's correct.[20]

Q. Okay. Then, if you would, look over on Page 3, the middle of the page, starting with the paragraph that starts out, "To the best" -- "To the best of my knowledge, neither the Federal Highway Administration or the State of Texas conducted any independent investigation of any of the crossings that received Federal funds for the installation of retroreflectorized tape to determine whether or not the addition of the tape to the existing cross bucks made the crossing safer," correct?

A. Yes, that's correct.

Q. And there was no attempt on the part of the State of Texas or, to your knowledge, the FH -- Federal Highway Administration or the Secretary of Transportation to make any kind of individual study of each one of these crossings where the passive devices were brought up to standard or where the reflectorized tape was put on them to see whether or not those crossings needed gates and lights, correct?

A. That's correct.

Q. That was not the purpose of either program, correct?

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[20] Deposition Testimony of Darin Kosmak at p. 137-138, ll. 20-5, *Chorn v. Atchison, Topeka & Santa Fe Ry. Co.*, Cause No. 95-811, Texas, 171st Judicial District Ct., El Paso County (taken October 15, 1998).

A. That's correct, uh-huh.[21]

Because state "minimum protection" programs do not address the adequacy of signalization at particular crossings, compliance with such programs cannot serve as a basis for preemption.

It is interesting to note that Texas' minimum protection program was implemented in order to comply with a Texas statute requiring reflectorized crossbucks.[22] Even though the upgrade was required by state law, and even though Texas common law requires railroads to provide adequate signalization at crossings, federal funds were used to reflectorize Texas' crossbucks. Had railroad money been used to reflectorize Texas' crossbucks, federal monies could have been used to install automatic gates and lights at the crossing where the accident occurred.[23] Installation of automatic gates and lights would likely have prevented Mr. Chorn's death.

The only way in which a state's minimum protection program could justify preemption would be if the state adopted and fully implemented the federal requirements for grade crossing safety, set forth at 23 C.F.R. 646.214(b)(3) and (b)(4).

IV. PREEMPTION OF CLAIMS AT A GIVEN CROSSING IS NOT NECESSARILY PERMANENT.

Amicus concedes that inadequate signalization claims are preempted at a crossing where signalization approved by the Secretary is installed and operating.

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[21] *Id.* at pp. 121-122, ll. 6-4.

[22] *Id.* at pp. 136, ll. 12-18.

[23] *Id.* at pp. 127-128, ll. 15-3.

Amicus points out, however, that preemption of claims at a given crossing in one instance does not necessarily mean that claims will always be preempted. The fact that signalization at a given crossing becomes adequate does not mean that it will always remain adequate. This is particularly true of crossings for which the Secretary approves passive warning devices pursuant to 23 C.F.R. §646.214(b)(4). Should circumstances change at such a crossing, causing it to fall within subsection (b)(3)(i), for example, the Secretary's previous approval of passive devices would be moot and claims would no longer be preempted.

Likewise, at crossings falling under subsection (b)(3)(ii), where the Secretary approves passive warning devices based on the recommendation of a diagnostic team (even though the (b)(3)(i) factors are present), circumstances could change rendering the diagnostic team's decision moot.

The Court need not decide whether preemption attaches permanently to a crossing once devices approved by the Secretary are installed and operating. Amicus simply points out that this is an issue which may arise in the future.

V. 23 U.S.C. §409 WOULD NOT PREVENT RAILROADS FROM PROVING PREEMPTION.

The Sixth Circuit opinion requires that, to prove preemption, railroads must prove that the Secretary approved the signalization which was present when the collision occurred. *Shanklin*, 173 F.3d at 394. As discussed in Part II of this brief, the Court should also require the railroad to prove that the warning devices approved by the Secretary are installed and operating.

Petitioner argues that Title 23 United States Code, § 409, prohibits it from producing the evidence necessary to show the Secretary's approval, and that the Sixth Circuit opinion is therefore unworkable. Under Petitioner's reading of § 409 (that "all evidence relevant to preemption is legally

inadmissible and not even discoverable" under § 409),[24] the privilege would also protect documents showing that the approved devices are installed and operating.

Title 23 United States Code, § 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

A. It Is Appropriate For The Court To Address The 23 U.S.C. § 409 Issue.

1. *The Court should address the 23 U.S.C. § 409 issue because it is a "subsidiary question fairly included" in Petitioner's federal preemption argument*

Whether the 23 U.S.C. § 409 privilege covers documents showing the Secretary's approval of warning devices is a "subsidiary question fairly included" in Petitioner's federal preemption argument under Rule 14.1(a) of the Supreme Court Rules, which provides, in pertinent part:

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[24] Petitioner's Brief at 43.

> The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

See Yee v. *Escondido*, 503 U.S. 519, 535 (1992) ("[u]nder this Court's Rule 14.1(a), 'questions set forth in the petition, or fairly included therein, will be considered by the Court'"); *Missouri v. Jenkins*, 515 U.S. 70, 84 (1995) (the Court will address issues "fairly included in the question presented"); *United States* v. *Mendenhall*, 446 U.S. 544, 551-552, n. 5 (1980)(opinion of Stewart, J.) (where the determination of a question "is essential to the correct disposition of the other issues in the case," this Court treats it as "fairly comprised" by the questions presented in the petition for certiorari).

Not only is the § 409 issue "fairly" included in Petitioner's brief, it is plainly included (Petitioner's Brief at 42-48). Petitioner argues that it cannot be required to prove the Secretary's approval of warning devices because the documents necessary to make this showing are privileged under § 409. The scope of the § 409 privilege is a "subsidiary question fairly included" in Petitioner's federal preemption argument. The Court should therefore address it.

2. *The Court should address the 23 U.S.C. § 409 privilege issue because this was an essential basis for the decision below, necessary for resolving the underlying question of federal preemption*

This Court will address issues which were the basis for the decision below. *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379, n. 5(1996) ("[w]e generally do not address arguments that were not the basis for the decision below. See *Peralta* v. *Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988)"). The Court also addresses issues "essential

to [the] analysis of the Court of Appeals". *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978).

The Court will also address issues necessary to resolve the question presented. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990) (declining to address an issue the resolution of which was "unnecessary to our decision on the narrow question presented"). *See also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788 n.8 (1990) and *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60, n. 2 (1981).

The Sixth Circuit concluded that the § 409 privilege does not apply to documents showing the Secretary's approval of warning devices, and this was an essential basis for that court's decision. It was necessary for the Sixth Circuit to reach this conclusion to resolve the underlying issue of federal preemption. Had the Sixth Circuit adopted the Petitioner's broad view that the § 409 privilege applies to documents showing the Secretary's approval of warning devices, the result in *Shanklin* would have been different, because railroads could not be required to prove the Secretary's approval with prohibited documents.

Thus, resolution of the scope of the § 409 privilege was an essential basis for the Sixth Circuit's opinion, and necessary to resolving the underlying question of federal preemption.

B. This Court Must Construe The § 409 Privilege Very Narrowly Because There Is No "Clear And Manifest Purpose" Of Congress That It Be Interpreted Broadly

This Court presumes that privileges, like the § 409 privilege, are construed narrowly:

> [P]rivileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth."

United States v. Nixon, 418 U.S. 683, 710 (1974).

Moreover, as discussed in argument Part I of this brief, there is a heavy presumption against federal preemption of state law. The § 409 privilege, if applied, would preempt state law. Accordingly, § 409 must be interpreted narrowly, absent a "clear and manifest purpose of Congress" to the contrary. *CSX Transp., Inc. v. Easterwood*, 507 U.S. at 663-64.

Congress' purpose in passing § 409 is neither clear nor manifest, as various state and federal court opinions recognize. In *Light v. State of New York*, 149 Misc. 2d 75, 560 N.Y.S.2d 962 (Ct. Cl. 1990), the New York Court of Claims, having considered statute's legislative history, including H. Conf. Rep. No. 100-27, reprinted in 1987 U.S. Code Cong. & Admin. News 66, 156-57, noted that there is "no record of discussion or comments as to the specific legislative purpose" of § 409. 149 Misc. 2d at 79, 560 N.Y.S.2d at 964 [25]

In *Southern Pacific Transp. Co. v. Yarnell*, 181 Ariz. 316, 890 P.2d 611 (1995), the Arizona Supreme Court observed that, "[s]o far as we are aware, the history of 23 U.S.C. § 409 is nonexistent." 181 Ariz. at 318, 890 P.2d at 613. *See also Department of Transportation v. Superior Court*, 47 Cal. App. 4th 852, 857, 55 Cal. Rptr. 2d 2, 5 (1996) (declining to adopt a broad reading of § 409 in the absence of "clear" Congressional intent).

In contrast, the Utah Court of Appeals determined in *Duncan v. Union Pacific R. Co.*, 790 P.2d 595, 597 (Utah App. 1990) that the legislative purpose of § 409 can be "gleaned" from H. Conf. Rep. No. 100-27. It concluded that

[25] The *Light* court speculated that the congressional intent behind the statute was "merely to keep the record keeping required by Federal funding provisions from providing an additional, virtually no-work tool for direct use in private litigation." 149 Misc. 2d at 80, 560 N.Y.S.2d at 965.

the legislative intent was "to facilitate candor in administrative evaluations of highway safety hazards". *Id.*

In *Guillen v. Pierce County*, 96 Wash. App. 862, 870, 982 P.2d 123, 128 (1999), the Court of Appeals for the State of Washington noted that

> [S]ection 409's purpose is "to prohibit federally required record-keeping from being used as a 'tool. . . in private litigation,'"[citation omitted], thereby facilitating "the free flow of safety-related information"[citation omitted] and "candor in administrative evaluations of highway safety hazards." [citation omitted]

Finally, in *Tardy v. Norfolk S. Corp.*, 103 Ohio App. 3d 372, 377, 659 N.E.2d 817, 819 (1995), the Ohio Court of Appeals, without citing any authority, concluded that the legislative intent behind § 409 is "obvious": to encourage "candor" on the part of railroads in reporting hazardous crossings.

What these cases establish is that Congress' intent in passing 23 U.S.C. § 409 is not clear. Because there is no "clear and manifest purpose of Congress" with respect to § 409, this Court must interpret it narrowly. *Easterwood*, 507 U.S. at 663-64, *Medtronic, Inc. v. Lohr*, 518 U.S. at 485.

Congress amended 23 U.S.C. § 409 in 1995, adding the words "and collected" after the word "compiled" to the statute. The amendment included the following legislative history:

> Sec. 328. Discovery and admission as evidence of certain reports and surveys.
>
> This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 to title 23. It is intended that raw data collected prior to being made part of any formal or bound report shall not

> be subject to discovery or admitted into evidence in a Federal or State court proceeding . . . .

H. R. Rep. No. 104-246 (1995), reprinted in 1996 U.S.C.C.A.N. 522.

This legislative history does not clarify which documents Congress intended to cover under the § 409 privilege. According to this legislative history, raw data collected for the sole purpose of being included in a "formal or bound report" is not discoverable before it is placed in such a report.

Because there is no "clear and manifest" Congressional intent regarding § 409, this Court must interpret is narrowly.

C. The Court Should Adopt The Sixth Circuit's Narrow Reading Of § 409.

The Sixth Circuit rejected Petitioner's overly broad interpretation that "all evidence relevant to preemption is legally inadmissible and not even discoverable" under § 409. *Shanklin*, 173 F.3d at 396 ("[w]e conclude that Norfolk Southern misreads the requirements of §409").

In *Shanklin*, the Sixth Circuit correctly interpreted § 409 narrowly. It clearly ruled what § 409 does *not* cover: documents showing the Secretary's approval of warning devices. Further, the Sixth Circuit appears to define what *is* covered under § 409: the reports and surveys specifically mentioned in 23 U.S.C. §§ 130, 144 and 152.

As to documents showing the Secretary's approval, *Shanklin* plainly holds that the § 409 privilege does not apply:

> We are satisfied that the FHWA's approval, i.e., the approval of the Secretary or his agent, of the use of passive warning devices at a particular crossing is not barred from discovery or admission into evidence by § 409.

Shanklin, 173 F.3d at 397. FHWA approval documents are not privileged under § 409 because they are *not* explicitly mentioned in 23 U.S.C. §§ 130, 144, 152 or 409:

> Section 409 does not, however, mention the Secretary's approval of any projects as to which these "reports, surveys, schedules, lists, or data" have been "compiled or collected"

Id. Under this rationale, documents proving installation and operation of the approved devices likewise would not be privileged under § 409 because such documents are not explicitly mentioned in 23 U.S.C. §§130, 144 or 152.

The Sixth Circuit also appears to define the narrow group of documents which *are* privileged under § 409: the reports and surveys explicitly mentioned in 23 U.S.C. §§ 130, 144 and 152, which *Shanklin* identifies as: (1) the surveys to establish and implement particular railway-highway schedules, required by 23 U.S.C. §130(d); (2) the annual report required of each state by § 130(g); (3) the inventory of bridges required by 23 U.S.C. § 144(b); (4) the biannual report required of the Secretary of Transportation under § 144(i); (5) the engineering survey of public roads to establish and implement an improvement schedule, required by 23 U.S.C. § 152(a), and; (6) the annual highway hazard report to Congress required of each state under §152(g). *Shanklin*, 173 F.3d at 396-97. These documents are privileged under § 409 because:

> Section 409 explicitly prohibits these "reports, surveys, schedules, lists or data compiled or collected" from being discovered or admitted into evidence.

Id.

The Arizona Supreme Court reached the same conclusion regarding what § 409 covers in *Southern Pacific Transp. Co. v. Yarnell*, 181 Ariz. at 319, 890 P.2d at 614:

> [T]he documents exempt from discovery and excluded from evidence under § 409 are precisely the documents described and prepared under the authority of §§130, 144, and 152, and no others.

The Sixth Circuit clearly ruled that FHWA approval documents are not privileged under § 409 and Amicus urges the Court to adopt this rule. Amicus further asks the Court to rule that § 409 does not apply to documents showing installation and operation of devices approved by the Secretary.

The Sixth Circuit also appears to conclude, as the Arizona Supreme Court did, that the only items privileged under § 409 are the reports and surveys specifically mentioned in 23 U.S.C. §§ 130, 144 and 152. Amicus asks the Court to adopt this rule, as well. Such a rule is entirely consistent with the plain wording of the statute, and the plain wording of a statute contains the best evidence of Congress' intent. *CSX Transportation, Inc. v. Easterwood,* 507 U.S. at 664. Under the "plain meaning" canon of statutory construction, the meaning of a statute is to be determined from the plain meaning of the terms. *United States v. Clarke*, 445 U.S. 253, 254 (1980).

CONCLUSION

For the foregoing reasons, Amicus urges this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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